No. 96-1037

In The

Supreme Court of the United States

October Term, 1997

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari
To The Oklahoma Court Of Appeals

BRIEF FOR THE SEMINOLE NATION OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION AS AMICI CURIAE IN SUPPORT OF PETITIONER, KIOWA TRIBE OF OKLAHOMA

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BRIEF FOR THE SEMINOLE NATION OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION AS AMICI CURIAE IN SUPPORT OF KIOWA TRIBE OF OKLAHOMA

The Seminole Nation of Oklahoma and the Muscogee (Creek) Nation respectfully submit this Brief Amici Curiae, with the consent of both parties, pursuant to SUP. CT. R. 37.3.[1]

INTERESTS OF AMICI SUPPORTING THE KIOWA TRIBE

Amici are two of thirty-seven federally recognized Indian tribes within the State of Oklahoma, and two of what were formerly known as the "Five Civilized Tribes."[2] Amici have strong interests in protecting their abilities to perform important governmental functions free from unconsented, private party lawsuits, whether in state, tribal, or federal courts. More specifically, as is the case with other governmental entities enjoying immunity from unconsented suit, Amici seek to safeguard their governmental treasuries, which contain monies derived not only from tribally imposed taxes, licenses and their

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[1] Pursuant to SUP. CT. R. 37.6 counsel for Amici state that no counsel for a party authored this brief in whole or in part. Counsel for Amici further state that the Muscogee (Creek) Nation Bar Association has agreed to fund a portion of only the costs associated with printing this brief. Letters of consent on the parties are filed herewith.

[2] Amici are now referred to simply as members of the "Five Tribes" consisting of the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, the Muscogee (Creek) Nation and the Seminole Nation.

own economic development activities, but also from various federal grant and self-governance programs, under P.L. 93-638, as amended.

Because Amici and most other Oklahoma Indian tribes have a relatively small amount of tribal trust or federally restricted land, and because much of the individual Indian allotted land over which tribes like Amici have jurisdiction have passed out of restricted ownership, many tribes must conduct governmental and economic activities, at least in part, on non-Indian lands. Whether or not a particular agreement was "executed" on tribal lands (as Oklahoma law, but not federal law, now appears to require) is often a difficult issue to resolve. Accordingly, the decisions in the instant case and related Oklahoma cases already decided (and some pending for certiorari consideration by this Court) have had a significant chilling effect on vital economic and contractual activities for Amici.

SUMMARY OF ARGUMENT

Under Art. I, § 8, cl. 3 of the Constitution, Congress is the branch of the United States government that constitutionally has been granted the primary "guardianship" responsibility and plenary power over Indian tribes and Indian affairs. Tribal immunity from unconsented suit was first expressly *recognized* by decisions of this Court. Accordingly, because historically Congress exercises plenary power in either preserving or restricting tribal immunity from suit, the courts have no power to abrogate tribal sovereign immunity. Only Congress should engage

in policy decisions of whether to modify or abrogate tribal immunity. Since Congress, aware of the unanimous federal-court and near-unanimous state-court view that the tribal sovereign immunity doctrine extends to tribal activities outside of Indian country, has elected *not* to modify that result, Amici urge this Court to treat the congressional will as conclusive.

Under the "Indian Commerce Clause," U.S. CONST. Art. I, § 8, cl. 3, Congress alone has the plenary power to determine or alter the scope of tribal sovereign immunity, and Congress consistently has demonstrated that it knows how to modify the doctrine *how, where and when it wants to.* A near-century-long line of unwavering decisions from this Court has stated the tribal-immunity principle in unqualified terms. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,* 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation").

Amici argue that the current, unqualified rule of tribal sovereign immunity for acts or conduct outside tribal lands adopted by federal courts — and also by most state courts that have addressed this specific issue – – promotes important congressional Indian policies including promoting self-determination and "protecting the sovereignty of each tribal government," *see* 25 U.S.C. § 3601(2) (1994). Further Amici contend that the prevalent caselaw addressing the instant issue is neither "unworkable [n]or badly reasoned." *Cf. Payne v. Tennessee,* 501 U.S.

808, 827 (1991) (applying those tests to questions of stare decisis).[3]

Amici further contend the Oklahoma Supreme Court holdings regarding tribal sovereign immunity for activities outside Indian country are not only contrary to prevailing federal law, but wholly unnecessary. There is no need to disturb the parties' bargained-for contract in which the tribe expressly reserved all of its sovereign rights. The parties knew how to contract to waive tribal immunity from suit but chose not to.

As a threshold matter, Amici will also briefly address the legally-operative distinctions between state, tribal, and federal sovereign immunities, and in so doing will highlight both the principles and precedent pursuant to which the instant dispute should be resolved. In so doing, Amici will distinguish *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that the United States Constitution does not require a state to recognize the immunity from suit of another state in the courts of the former state) a case Oklahoma courts rely on to reach the decisions below.

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[3] *See, generally, Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (emphasis added) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, . . . Congress remains free to alter what we have done."); *Patterson v. McLean Credit Union*, 485 U.S. 617, 621 (1988) (Blackmun, J., dissenting from order directing rehearing) ("The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this . . . matter.").

ARGUMENT AND AUTHORITIES

I. ALTHOUGH OF SIMILAR ORIGIN THE IMMUNITIES OF TRIBES AND STATES FROM SUIT HAVE SIGNIFICANTLY DIFFERENT ATTRIBUTES.

At the time of the United States Constitution's framing, Alexander Hamilton wrote: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind," THE FEDERALIST NO. 81 (Alexander Hamilton) 125-26 (Edward G. Bourne ed., 1937) [hereinafter "FEDERALIST 81"]. In the last one and a half centuries, this Court has reiterated Hamilton's notion:

> [It] is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.

Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858) (Taney, C.J.); *Smith v. Reeves*, 178 U.S. 436, 440-41 (1900). Thus, the roots of the immunity lie in sovereignty. Moreover, this Court has adopted Hamilton's understanding as the foundation of its sovereign-immunity jurisprudence. *E.g., Hall*, 440 U.S. at 415 (1979) ("[T]he notion that immunity from suit is an attribute of sovereignty is reflected in our cases.").

This Court consistently has held that the United States may not be sued without its consent. *See, e.g., McElrath v. U.S.*, 102 U.S. 426, 440 (1881); *cf. United States v. Mitchell*, 445 U.S. 535, 538 (1980) (describing that conclusion as "elementary"). All of this Court's rulings on

the sovereign immunity[4] of states have arisen in the context of Article III and the Eleventh Amendment of the Constitution;[5] such issues have vexed federal constitutional jurisprudence from the time of this Court's first docketed case, see *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791) (involving an original-jurisdiction suit – later voluntarily withdrawn – by foreign citizens against a state to recover on a loan); *cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (concluding that U.S. CONST. Art. III, § 2, para. 1, cl. 6 authorized federal-court suit against unconsenting state by citizen of another state), to the Court's last Term, *see Coeur d'Alene Tribe*, 117 S. Ct. 2028 (holding that federal-court action brought by a tribe against state was essentially an action for quiet title, and barred by Eleventh Amendment).

However, in the context of *tribal* sovereign immunity, this Court has adopted an approach, what is essentially a "per se" or "categorial" rule: " '[W]ithout congressional authority,' the 'Indian Nations are exempt from suit.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)) ["*USF&G*"]. In short, Amici

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[4] *Cf. Coeur d'Alene Tribe v. Idaho*, 117 S. Ct. 2028, 2033 (1997) ("[T]he Eleventh . . . Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.").

[5] In addition, in *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979), which addressed the immunity of a state from suit in the courts of another state, this Court examined the potential applicability of the Full Faith and Credit Clause to state immunity. *See generally, infra*, at n.6 (further discussing *Hall*).

contends whether the tribal conduct occurred within or outside of Indian country, the tribe is immune from suit.

Indian tribes derive their sovereignty from their status as extra-constitutional, domestic-dependent nations that hold undiminished powers except as limited by Congress or tribes themselves. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *USF&G*, 309 U.S. at 512. Put another way, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1988) (*Three Tribes II*). That mode of analysis, in turn, is quite distinguishable from the somewhat broader brush (and less statutorily-dependent) approach it has taken with respect to *state* sovereign immunity questions under Eleventh Amendment. As this Court has noted:

> Behind the words of the [Eleventh Amendment and Article III] are postulates which limit and control. . . . There is . . . the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits, save where there has been "a *surrender of this immunity in the plan of the convention.*" The Federalist, No. 81.

Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (citations omitted) (emphasis added).

As noted above, Amici do not suggest that state and tribal sovereign immunities have nothing in common. Sovereignty is the basis for both. *Compare* FEDERALIST 81, *supra*, at 126 ("[T]he exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.") *with Blatchford v. Native Village of*

Noatak, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns.") and *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

A second similarity is that courts will not find a statutory abrogation of state or tribal immunity unless the congressional intent so to do is clear. *E.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (states); *Santa Clara Pueblo*, 436 U.S. at 58 (tribes); *cf. United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 354 (1941) (applying Indian-law "canons of construction," pursuant to which ambiguous expressions in federal statutes will not be construed in a manner constrictive of tribal rights); and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.").

Furthermore, states and tribes enjoy immunity from suit even though both have experienced some diminution in sovereignty. *See, e.g., Blatchford*, 501 U.S. at 781-82 (contemplating the original states' voluntary surrender of some aspects of their sovereignty by their ratification of the United States Constitution); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[The Indian tribes] occupy a territory to which we assert a title independent of their will. . . . "); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives title which the Courts of the Conqueror cannot deny."); *cf. Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing Indian tribes as "domestic dependent nations").

But there are fundamental differences between state and tribal immunities from suit. Highlighting the distinction drawn by the citations to *Cherokee Nation* and *Johnson*, this Court recently observed:

> The relevant difference between States and foreign sovereigns . . . is . . . the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. *What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.* We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782 (first emphasis added, citation omitted). From that divergence, four secondary consequences accrue. First, while this Court has treated state sovereign immunity as exclusively controlled by the United States Constitution, *see, e.g., supra* at 7 (quoting this Court's "plan of the Convention" analysis in *Principality of Monaco*); *Hans v. Louisiana*, 134 U.S. 1, 10-16 (1890) (examining the "original understanding" of Article III as it informs Eleventh Amendment jurisprudence),[6] it

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[6] While it might initially be thought that *Nevada v. Hall*, 440 U.S. 410 (1979), was the "exception" that proves the rule, that is not the case. In *Hall*, this Court characterized the issue presented by Nevada (whose sovereign immunity was not

has not done so in the tribal sovereign immunity arena, *e.g., Three Tribes II*, 476 U.S. at 890 (characterizing tribal immunity from suit as a creature of federal common law).

A second difference between tribal and state immunity arises from the fact that the "plan of the Convention" called for states, *but not tribes*, to be "represented" in Congress. *Cf. Garcia v. San Antonio Metropolitan Transit District*, 469 U.S. 528, 547-55 (1985) (finding that due to their "representation" in that body, states' needs for judicial remedies under the Tenth Amendment will not often be persuasive). Needless to say, Indian tribes are not congressionally "represented" in the same way as are

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recognized by California's state courts) as premised on the existence of a "federal rule of law *implicit in the Constitution* that requires all States to adhere to the sovereign-immunity doctrine as it prevails at the time the Constitution was adopted." 440 U.S. at 418 (emphasis added). Having thus characterized the federal question presented this Court devoted the residuum of its opinion to issues of constitutional law. *Id.* at 418-20 (examining Article III at its "original understanding"); *id.* at 420-24 (responding to Nevada's Full Faith and Credit Clause contention); *id.* at 424-27 (rejecting argument tendered by Nevada based on structure of United States Constitution).

Moreover, in *Hall*, this Court drew the distinction – in that *state* sovereign immunity case – between immunity from "suits in the sovereign's own courts and . . . suits in the courts of another sovereign." 440 U.S. at 414-17. But this Court had rejected that distinction with respect to the sovereign immunity of the United States, *e.g., United States v. Shaw*, 309 U.S. 495, 505 (1940) (recognizing federal immunity from suit in *state* courts), and with respect to the sovereign immunity of Indian tribes, *e.g., Santa Clara Pueblo*, 436 U.S. at 49 (recognizing tribal immunity from suit in *federal* courts, absent abrogation by Congress); *Three Tribes II*, 476 U.S. at 889-91 (recognizing tribal immunity from *state*-court suits absent similar abrogation).

states. States participated in a mutuality of concessions at the Constitutional convention whereas tribes were not parties and exist extra-constitionally. Amici respectfully submit that since Congress has not categorically altered Indian tribes' claim to their continued enjoyment of a tribal sovereign immunity right a categorical analysis is all the more compelling.

A third distinction arises from the federal "trust" responsibility, which relates to Indian tribes but not states. As will be developed further herein, *see infra* at Proposition II, § C, it is *Congress* which is the primary obligor (and interpreter) of that trust responsibility. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 540-46 (1980). The congressional trust responsibility conjoined with the federal common law (and therefore statutorily amendable) nature of tribal sovereign immunity may well have contributed to this Court's historically unwavering decision to refrain from curtailing tribal sovereign immunity on its own. The federal government has no trust responsibility to states, but it does to tribes.

This Court has from time to time offered the reminder that generalizations are "particularly treacherous" in the field of Indian law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Indian tribes are *not* states. Accordingly, it *is* treacherous indeed to import to tribes notions that are properly applied to states. *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (making a similar point in the context of state taxation of non-Indians in Indian country).

Furthermore, in a number of cases, this Court has analogized tribal immunity from suit to the sovereign

immunity of the United States. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 324 & n.349 (Rennard Stickland, ed., 1982) (citing cases); *cf. USF&G*, 309 U.S. at 512 ("It is as if the immunity which was theirs as sovereigns passed to the United States for their benefit."). The United States has long asserted sovereign immunity with respect to its extraterritorial acts. *E.g.*, 28 U.S.C. § 2680(k) (1994) and this Court has upheld such assertions. *See, e.g., Smith v. United States*, 507 U.S. 197 (1993) (upholding federal sovereign immunity from suit on tort allegedly committed by United States in Antarctica); *United States v. Spelar*, 338 U.S. 217 (1949) (upholding such immunity with respect to tort allegedly committed by United States in Canada). Though not suggesting that tribal and federal immunities from suit are necessarily identical in every particular, *see Three Tribes II*, 476 U.S. at 890, Amici do suggest that the precedents applicable to the *United States'* sovereign immunity rather than *state* sovereign immunity furnish the best lens through which to view cases involving tribal immunity.

II. THIS COURT SHOULD NOT CONSTRICT ITS OWN CATEGORICAL APPROACH TO TRIBAL SOVEREIGN IMMUNITY FROM SUIT.

A. This Court Consistently Has Stated its Tribal Sovereignty Approach in Unqualified Terms, and All Federal Courts and Most State Courts, with Few Exceptions, Have Relied on This Court's Unqualified Tribal Immunity Decisions to Apply the Tribal Immunity Doctrine to Tribal Activities Outside Indian Country.

Indian tribes do not depend on statute or treaty for their sovereign status. *E.g., United States v. Wheeler*, 435

U.S. 313, 320-30 (1978); *Talton v. Mayes*, 163 U.S. 376, 382 (1896). Tribal sovereignty includes tribal immunity from suit, *Potawatomi Tribe*, 498 U.S. at 509; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup III*, 433 U.S. at 171-173; *USF&G*, 309 U.S. at 512-513; *Turner v. United States*, 248 U.S. 354, 358 (1919). In turn, tribes' immunity from suit is similar to that of the United States and is categorically upheld, *see, e.g., Santa Clara Pueblo*, 436 U.S. at 58 (emphasis added, citations omitted):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of *Congress*. But "without congressional authorization" the "Indian Nations are exempt from suit."

Lower federal courts have interpreted this Court's rule on tribal sovereign immunity as either requiring or authorizing the application of tribal immunity from suit in cases involving tribal activities outside Indian country. Amici have found not one case in which a federal court has held that tribal immunity from suit is inapplicable to tribal activities outside Indian country. *Cf. Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.), *cert. denied sub nom., Willingham v. Sac & Fox Nation*, 116 S. Ct. 57 (1995); *In re Greene v. Mt. Adams Furniture*, 980 F.2d 590, 596 (9th Cir.), *cert. denied*, 114 S. Ct. 681 (1992); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D.Conn. 1996); *Federico v. Capital Gaming Int'l, Inc.*, 888 F. Supp. 354 (D. R.I. 1995); *Elliot v. Capital Investment Bank & Trust*, 870 F. Supp. 733 (E.D. Tex. 1994).

With only a few deviations that Amici have found (discussed *infra*), state courts have reached the same conclusion. For example, the Courts of Washington and Arizona have held that tribal sovereign immunity bars suits against tribes arising from their activities outside Indian country. *North Sea Products, Ltd. v. Clipper Seafoods*, 595 P.2d 938, 941 (Wash. 1979) (en banc – all justices concurring) (upholding tribal immunity regarding garnishment action against off-Indian country business); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983) (upholding tribe's sovereign immunity for tribal business's off-Indian country transactions); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (Arizona Supreme Court, en banc, unanimously holding no jurisdiction against tribe for tort suit involving off-reservation commercial conduct); *White Mountain Apache Indian Tribe v. Shelly*, 480 P.2d 654 (Ariz. 1970) (tribe immune from suit arising from off-reservation contract). The highest courts of Arizona, New York, and Florida, to take but a few examples, have applied tribal sovereign immunity without even considering the locus of the tribal activity sued upon, *Smith Plumbing Co., Inc. v. Aetna Cas. & Sur. Co.*, 720 P.2d 499 (Ariz. 1986) (tribe properly dismissed as immune even though suit against insurer may proceed); *Ranson v. St. Regis Mohawk Educ. & Comm.*, 658 N.E.2d 989 (N.Y. 1995) (tribal entity immune from suit); *Seminole Tribe of Florida v. Houghtaling*, 589 So.2d 1030 (Fla.App.2d Dist. 1991), *aff'd*, 611 So.2d 1235 (Fla. 1993) (tribe immune from suit despite involvement in commercial enterprise).

It appears that before the New Mexico Supreme Court decided *Padilla v. Pueblo of Acoma*, 754 P.2d 845

(N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) no modern-era state court of last resort had ever held that tribal sovereign immunity was inapplicable to activities outside Indian country. A year and a half ago, and only three months after the New Mexico Court of Appeals strongly suggested that the New Mexico Supreme Court should revisit its *Padilla* analysis, *DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1068 (N.M. App. 1995), *cert. denied*, 903 P.2d 844 (N.M. 1995), the Oklahoma Supreme Court (relying on its recent tribal-sovereignty-restrictive approach articulated in *Lewis*),[7] followed the New Mexico Supreme Court's

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[7] *E.g., Lewis v. Sac & Fox Tribe Housing Authority*, 896 P.2d 503, 508, *cert. denied*, 116 S. Ct. 476 (1995) ("Only that litigation which is expressly withdrawn by Congress or that infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."); *Hoover*, 909 P.2d at 62 (same). The Oklahoma Supreme Court followed *Lewis* in *Aircraft Equipment*, 921 P.2d 359 (Okla. 1996) (same). The *Lewis* line of caselaw has been extensively criticized in the literature, *see, e.g.* Frank Pommershiem, *A Symposium on Tribal Courts: Introduction*, 19 OKLA. CITY U.L. REV. 1, 3 (1994); Dennis Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era and a Glimpse at the Road Ahead*, 19 OKLA. CITY U.L. REV. 5, 72-73 n. 389 (1994), The Oklahoma Supreme Court's deviations from established federal Indian law, *e.g., State ex. Rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) have been so misguided at times as to be federally enjoined, *Seneca-Cayuga Tribe of Okla. v. Thompson*, 874 F.2d 709 (10th Cir. 1989).

The Oklahoma Supreme Court's reasoning in *Hoover* and subsequent cases distort this Court's holding in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), wherein this Court ruled that the well-pleaded-complaint rule precluded *removal* of a case in which tribal sovereign immunity was asserted as *defense*. *Compare Graham*, 489 U.S. 838, 840-42 (1989), *with Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, 921 P.2d 359, 362 (Okla. 1996); *First Nat. Bank in Altus v. Kiowa, Comanche and Apache*

Padilla approach, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).[8] No other state court has reached a similar conclusion.[9]

This Court frequently holds that Congress is presumed to legislate with knowledge of the caselaw treating an issue. *See, e.g., Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Moreover, in light of the extensive review (and amendment) of statutes such as the Indian Self-Determination and Education Assistance Act, PUB. L. NO. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C.A. §§ 450 *et*

Intertribal Land Use Committee, 913 P.2d 299, 300 (Okla. 1996) and *Hoover*, 909 P.2d at 61; *Aircraft*, *id* at 362:

> supporting the fact that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws.

[8] *See also Aircraft Equipment*, subsequent enforcement proceeding, No. 85272, 1997 WL 222406, (Okla. May 10, 1997); *Carl E. Gungoll Exploration v. Kiowa Tribe of Oklahoma*, No. CIV-96-2059-T, United States D. Ct. (W.D. Okla. 1997); *Kiowa Tribe of Oklahoma v. First Nat. Bank of Mountainview, Okla., Garnishee*, No. CIV-96-1624L, United States D. Ct. (W.D. Okla. 1997); *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, No. 86,568 (Okla.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. ___ 1997 (No. 96-1721).

[9] The numerous cases in which state courts have held that tribal *corporations* may be sued with respect to *their* activities outside of Indian country (or for that matter within Indian country in Public Law 280 states), based on the presence of "sue and be sued" clauses in their charters, *see, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989) are manifestly irrelevant to the instant dispute in which an Indian tribe itself was the named defendant below.

seq. (1983 & Supp. 1997)), *see, e.g.*, PUB. L. NO. 103-413, Title I, 108 Stat. 4250 (1994) (providing comprehensive amendments affecting Self-Determination Act contracts), and in light of the congressional actions specifically addressing tribal sovereign immunity, there can be no doubt that Congress is fully informed of the tribal sovereign immunity caselaw generally.[10]

B. Congress Has Declined to Adopt Any Blanket Abrogation of Tribal Immunity With Respect to Activities Outside Indian Country.

For over a century, Congress has demonstrated its ability and willingness, on rare occasions, to abrogate tribal sovereign immunity where policy justifications have persuaded it to do so. *See, e.g.*, PUB. L. NO. 93-195, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal sovereign immunity); Act of April 6, 1906, § 18, 34 Stat. 137,

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[10] *See, Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985):

> Where . . . Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law, at least in so far as it affects the new statutes.

Amici respectfully submit that the same result should obtain when the "incorporated law" is federal common law rather than a statute. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985):

> Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in (28 U.S.C. § 1331).

(citing *inter alia County of Onedia v. Oneida Indians Nation*, 470 U.S. 226, 235-36 (1985).

144 (held to be a *limited* abrogation of tribal sovereign immunity in *USF&G*, 309 U.S. at 513); Act of June 28, 1898, § 2, 30 Stat. 495 (held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908)). Congress has shown sufficient interest in the field of tribal sovereign immunity for that Court to defer to Congress' intent with respect to tribal activity outside Indian country.

Conversely, both historically and over the last decade, Congress has often been presented with proposals to abrogate tribal sovereign immunity, but Congress has rejected the new policies suggested the existing common law of tribal immunity. In 1988, for example, Congress considered a bill which would have abrogated tribal sovereign immunity with respect to alleged violations of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. without reference to whether alleged civil rights violations arose within or outside Indian county. In relevant part that bill, which was proposed as an amendment to the Indian Civil Rights Act provided:

> Any aggrieved individual . . . may initiate an action in federal district court for declaratory, injunctive, or other equitable relief against *an Indian tribe, tribal organization*, or official thereof, alleging failure to comply with rights secured by this Act.

S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. S11, 656 (daily ed. Aug. 11, 1988) (emphasis added). But Congress rejected that invitation.

An identical bill was introduced before the 101th Congress in March 1989. S. 517, 101st at Cong., 1st Sess., 135 CONG. REC. S2190 (daily ed. Mar. 6, 1989). But that

invitation too, was declined. Those examples are by no means isolated ones.[11]

In short, Amici respectfully suggest that Congress has shown sufficient interest in the field of tribal sovereign immunity for this Court to defer to Congress' intent with respect to tribal activity outside Indian country.

Congress has not acted to limit tribal immunity to suit to activities within Indian country only. In its Brief in Opposition to Petition for Certiorari herein, Respondent Manufacturing Technologies cites no federal statute abrogation tribal immunity, and Amici has found no such statute. As this Court noted in *USF&G*, 309 U.S. at 515, "without legislative action the doctrine of immunity should prevail." Amici respectfully submit that this Court should defer to *that implicit* policy choice (which the status quo reflects) as well.

Important congressional policy reasons exist for preserving tribal immunity from unconsented suits. Indian governments are more vulnerable to suit than other governments given tribes' limited resources and small tax bases (if any). Most Oklahoma tribal governments have little revenue to fund and run all the services its members require. As a federal appellate court has recognized before, "[a]s rich as the Choctaw Nation is said to be in lands and in money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required

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[11] Amici notes that as of the date of writing this brief the proposed Senate version § 120 of the FY 1998 Interior Appropriations Bill suggests an elimination of tribal sovereign immunity upon the tribe's receipt of certain Bureau of Indian Affairs funding. No. 105-163, Senate Bill 2107.

to respond to all the demands which private parties chose to prefer against it." *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895).

During the modern era of congressional policy favoring tribal self-determination and self-sufficiency, "Congress has consistently reiterated its approval of the immunity doctrine." *Citizen Band Potawatomi*, 498 U.S. at 510 (citing examples); *See also, e.g.*, 25 U.S.C. § 3746 and 25 U.S.C. § 3601(2). Moreover, since the self-determination era began in the 1970s Congress has mentioned tribal immunity only when expressly preserving it in statutes that might otherwise be misconstrued.

C. This Court Has Historically Recognized Congress to be the Exclusive Authority to Define, Fulfill, and Apply the Federal Trust Responsibility.

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution.

Morton v. Mancari, 417 U.S. 535, 551-552 (1974). This Court has historically deferred to congressional actions (and inactions) in that field. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 56-72 (declining to diminish tribal sovereign immunity to an extent greater than Congress had done in the Indian Civil Rights Act). This Court held in *Mancari*, 417 U.S. at 479-80:

> [A]s long as the special treatment can be rationally tied to Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

In *Aircraft*, 921 P.2d at 362, the Oklahoma Supreme Court has appeared to have assumed Congress' role regarding policy in the application of tribal sovereign immunity and enforcement of contracts in state court:

> Such a policy protects all of our citizens including tribes who voluntarily chose to do business with their fellow Oklahoma citizens. If it were otherwise, the tribes would have difficulty finding anyone willing to risk funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business.

Federal trust responsibility policies are best left to Congress, rather than this Court or the Oklahoma Supreme Court.

D. To Limit Tribal Immunity From Suit to Cover Only Tribal Conduct Within Indian Country Would Undermine the Contemporary Congressional Policies Promoting Tribal Self-Determination and Economic Self-Sufficiency and Intrude in Areas Where Congress Enjoys Plenary Constitutional Power.

The modern era congressional reaffirmations of tribal sovereign immunity

> reflect Congress' desire to promote the good of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.

Citizen Band Potawatomi, 498 U.S. at 510 (internal quotation marks omitted); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). From the standpoint of

pursuing Congress' "overriding goal" in the area, the distinction between Indian country and non-Indian country tribal commercial conduct is one without a difference.

The federal policies of tribal self-determination, economic development, and cultural autonomy require tribal sovereign immunity, *see, e.g., United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982), and only Congress may modify that judgment. *See generally, Baker v. Carr*, 369 U.S. 186, 215-17 (1962) (Courts leave resolution of political questions to Congress); *Atkinson v. Haldane*, 569 P.2d 151, 161-62 (Alaska 1977) (political question doctrine applied to tribal sovereign immunity). Moreover, as noted in *American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citations omitted).

> Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development and cultural autonomy.

Presumably Congress is aware that the Kiowa land base, like most Oklahoma tribes, is small and comprised of a checkerboard jurisdiction area of trust land, allotments, dependent Indian communities and informal reservation areas as compared with large tribal reservation areas in the west like the Navajo Nation reservation. There are few large, contiguous tracts of tribal lands in Oklahoma. Probably most of the Kiowa government's commercial activities occur primarily on non-Indian

lands. Most tribes must necessarily hold their governmental funds in a local non-Indian bank, located on non-Indian land. It would be entirely impractical to expect tribes to establish banks only on the scarce remaining lands they hold. If a government's treasury is subject to execution at the pleasure of private parties assisted by state jurisdictional powers, no government could function. *Cf. Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20 (1846):

> The funds of governments are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of government may be suspended.

Congressional acquiescence to the prevalent federal and state caselaw on tribal sovereign immunity suggests that Congress is satisfied with the status quo. This inaction suggests a congressional policy of prohibiting private parties from suing a tribal government without their consent or seizing tribal government funds in aid of execution of a state court judgment.

With respect to evaluation of the significance of the contemporary congressionally prescribed tribal self-sufficiency goal when weighed against other federal commercial goals, Amici respectfully urge that Congress, not this Court (and to a greater extent, not state or federal courts) is in the best position to perform the balancing and regulation.

III. FOR THE PURPOSE OF APPLYING THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY, NO PERSUASIVE POLICY JUSTIFICATION SUPPORTS THE DRAWING OF A DISTINCTION BETWEEN INDIAN COUNTRY AND NON-INDIAN COUNTRY CONTRACTS WITH INDIAN TRIBES.

In the modern era, sovereign immunity operates to help ensure that "litigation . . . not be allowed to stop or slow down official activities that are essential to governing the nation."[12] Governments today frequently allow suits against themselves (except where a superior sovereign has abrogated the sovereign immunity of a lesser one, *see, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-57 (1976)), but only in the courts, *see, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) ("A State's constitutional interest in [11th Amendment] Immunity encompasses not only whether it can be sued, but where it can be sued"), and on the terms of the waiving government's choosing – be they federal,[13]

[12] 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 200-01 (2d ed. 1985); *cf.* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 471 (1989) (noting that sovereign immunity "preserves the unhampered exercise of discretion and limits the amount of time the government must spend responding to lawsuits.").

[13] *See, e.g.*, Federal Tort Claims Act, Act of June 25, 1948, *cf.* 646, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.A. § 2671 et seq. West 1993 & Supp. (1997).

state[14] or tribal.[15] *Cf. Coeur d'Alene Tribe*, 116 S. Ct. at 2033 (drawing parallels between Eleventh Amendment immunity and sovereign immunity). In the instant case, it was explicitly bargained in the contract that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Rec. App., Ex. A.

A. Sophisticated and Well-Informed Business Partners Are Aware of Tribal Sovereignty, the Existence of Extensive Congressional Oversight and Ways to Contractually Limit the Effects of Tribal Sovereign Immunity.

Parties who engage in commercial transactions with tribal governments should be aware of the special considerations when doing business with a tribal sovereign.[16]

[14] [Oklahoma] Governmental Tort Claims Act, tit. 51 Okla. Stat. Ann. § 151 *et seq.*, Laws 1978 c. 203, eff. July 1, 1978 *et seq.* Laws 1984 c. 226, § 1, eff. Oct. 1, 1985.

[15] Mashuntucket Pequot Tribe Code of Laws, tit. 6, Ch. 1, "Tort Claims-Sovereign Immunity Waiver" and tit. 12, "Civil Actions" (providing limited waiver of sovereignty against the tribal government, tribal employees and volunteers but limiting the waiver to official acts, for certain claims, by notice, within specified time periods, limiting types and amounts of damages and adjudicating claims in a tribal forum only).

[16] *See, e.g.*, William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994) (highlighting threshold issues for contracting with tribes); John S. Clifford, *Application of Article 9 to Secured Transactions in Indian Country*, 28 U.C.C.L.J. 290 (1995) (suggesting drafting choice of law, forum selection and immunity waivers in contracts with tribes); Mark Jarboe, *Fundamental Legal Principles*

Contracts between Indian tribes and non-Indians are subject to considerable federal oversight.[17] Scholars commenting on the sovereign immunity of Indian tribes conclude that only Congress[18] or tribes themselves can

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Affecting Business Transactions in Indian Country, 17 HAMLINE L. REV. 417 (1994); and Walter E. Stern, *Securing Transactions with Indian Tribes*, Paper No. 9, 1989 First Annual Natural Resources Management & Environmental Enforcement on Indian Lands Conf., Albq., Amer. Bar. Assoc. Section of Natural Resources, Energy and Environment (SONREEL), Committee on Native American Natural Resources.

[17] Congress enacted comprehensive statutes in 1834 to regulate trade with the Indians and organized the Department of Indian Affairs. 4 Stat. 729, 735. *See, Williams v. Lee*, 358 U.S. 217 (1959). Tribes cannot waive immunity by contract in matters affecting trust property without the consent of the Secretary of Interior, or of Congress. 25 U.S.C. § 81. Federal law requires that contracts involving tribal lands, including attorney contracts for legal services, must be approved by the Secretary of Interior. In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914) this Court held a contract void when the contracting party failed to procure this mandatory approval. Further, one who receives money or things of value from an Indian or Indian tribe under such a contract could be subjected to a "qui tam" action. 25 U.S.C. § 81; *see, e.g., Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993). The Bureau of Indian Affairs regulates attorney contracts with Indian tribes, *see* 25 C.F.R. Part 89. For a detailed analysis of secretarial approval needed for many transactions with Indian tribes, *see*, Vetter, *supra* n. 16, *at* 170-172.

[18] Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Business*, 79 Va. L. Rev. 1345 (1993) and Steven E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 120 (1992) ("no federal court has yet limited tribal immunity to reservation boundaries.").

alter tribal immunity, not state courts or state legislators.[19]

If a non-Indian business partner fails to take adequate steps to protect and secure a business transaction with an Indian tribe, such as obtaining a limited waiver of sovereign immunity from the tribe, requiring appropriate collateral to secure the transaction or providing for appropriate contractual recourse, then the trader has only himself or herself to blame.

There are no allegations of fraud here. Manufacturing Technologies knew full well it was dealing with an Indian tribe. In this case, the Kiowa Tribe, far from hiding its sovereign identity and attempting to cloak secretly the Tribe with immunity, fully and explicitly disclosed its intent to retain sovereign protection in the contract. This Court should neither second guess the parties' bargain nor abrogate the long-established doctrine of tribal immunity because a non-Indian trader failed to exercise due diligence in drafting a contract.

B. Manufacturing Technologies Could Have Protected Itself in the Contract by Employing Well-Known Contractual Methods to Deal With Tribal Immunity But Failed to Do So.

In this case the Respondent is a sophisticated business entity and presumably should have been aware of well-established doctrines of tribal immunity and planned its transactions with the tribe accordingly. The

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[19] Karen Lee Swaney, *Waiver of Indian Tribal Immunity in the Context of Economic Development*, 31 ARIZ. L. REV. 389 (1989).

Respondent does not have a special trust relationship with the federal government justifying denigration of immunity; the Tribe has the immunity protection and it specifically retained it in the agreement with respondent. This Court should not now second-guess both parties' clear contractual desire to not "subject or limit the Kiowa Tribe's sovereign rights." (Ex. "A," R.A.) If a commercial relationship is really important and the ability to enforce the contract is essential, parties – non-Indian and tribal alike – know how to draft contracts that waive sovereign immunity when they want to.

It is Amici's understanding that the Kiowa Tribe has an annual government budget of less than a million dollars, yet Respondent's judgment in this case alone totals more than half that amount (Kiowa Pet. Cert. at 10, all told the outstanding judgments against the Kiowa government in this and related cases surpass over one and a half times the Kiowa Tribe's annual budget), Kiowa Pet. Cert. at 8). The resulting enforcement of Respondent's judgment has the *de facto* effect of crippling daily tribal government services, forcing lay-offs and disrupting order for the Kiowa people. The effect of denying the bright-line rule of tribal sovereign immunity from suits relating to tribal commercial activity outside Indian country will be devastating to tribal governments. The denial would work a harsh intrusion on government operating capital and a severe impairment of the authority of tribal governments. Such a result would "impose serious financial burdens on already 'financially disadvantaged' tribes." *Santa Clara,* 436 U.S. at 64.

CONCLUSION

In view of the foregoing arguments, the judgment of the Oklahoma Court of Appeals should be reversed with explicit directions to vacate the decision of the trial court and dismiss the action against the Kiowa Tribe of Oklahoma.

Respectfully submitted,

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